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Managing Conflicts of Interest in China's Public Sector: Fighting Corruption at the Early Stage

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MANAGING CONFLICTS OF INTEREST IN CHINA'S PUBLIC SECTOR: FIGHTING CORRUPTION AT THE EARLY STAGE

By: Hao (Victor) Wu & Xiaoqi (Claudia) Sun⁺*

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I. INTRODUCTION

“Serving the public interest is the fundamental mission of governments and public institutions.”¹ Societies expect their public officials to perform their duties “efficiently, effectively, and with integrity” in an “attentive, fair, and impartial” manner.² However, when conflicts arise between the official’s private and public interests and such conflicts are inadequately managed, it is more likely that the official would fail that expectation,³ especially when the official is entrusted with the power to manage people, money, and procurement.⁴

Prevention of conflicts of interest (“COIs”) is a key element “of an effective long-lasting strategy of enforcement and education against corruption.”⁵ China has been exploring how to establish a system for COIs prevention since the 1980s, when commercial activities erupted.⁶ The growing volume of government activities in business-related policy framing and decision-making, and the emerging private commercial operations complicated the public-private interrelationship.⁷ Conflicts of interest became increasingly common in the public sector’s daily administration.

Although a socialist country, China operates, at its core, a market economy. The Chinese government engages in a full range of economic activities: it acts as a regulator, administrator, customer, and business owner by outsourcing public contracts, procuring supplies,

¹ OECD, *MANAGING CONFLICT OF INTEREST IN THE PUBLIC SECTOR: A TOOLKIT* 95 (2005), available at <http://www.oecd.org/gov/ethics/49107986.pdf> [hereinafter *OECD Toolkit*].

² See G.A. Res. 51/59, at 3, U.N. Doc. A/RES/51/59 (Dec. 12, 1996).

³ See *OECD Toolkit*, *supra* note 1, at 96.

⁴ See COUNCIL OF EUROPE, *CORRUPTION IN PUBLIC PROCUREMENT* 107 (1998) (pointing out that “[f]ew activities create greater temptations or offer more opportunities for bribery and extortion than public sector procurement. Every level of government and every kind of government organization purchases goods and services. This makes public procurement, where vast amounts of public expenditure come under the control of individual public servants, a prominent target for corruption.”).

⁵ *Id.*

⁶ Chen Shanguang (陈善光), *Fangzhi Liyi Chongtu Meiguo You Naxie “Zhaoshu”* (防止利益冲突美国有哪些“招数”), MINISTRY OF SUPERVISION (Dec. 20, 2012, 9:05 AM), <http://www.mos.gov.cn/mos/cms/html/3/68/201212/25705.html>.

⁷ See Roswell B. Perkins, *The New Federal Conflict-Of-Interest Law*, 76 HARV. L. REV. 1113, 1114 (1963).

and operating State Owned Enterprises (“SOEs”).⁸ The Chinese government hosts various economic stimulus programs and financial schemes within the central and local governments.⁹ The pervasiveness, in breadth and depth, of the national and regional support programs has enormous impact on the daily affairs of business and industry.¹⁰ The increased “mobility of individuals in employment, facilitat[es] a constant flow of individuals in and out of Government.”¹¹ Further, individual members of society have a deepened stake in the private economy due to purchases of stock and bonds.¹² These factors prompt COIs to arise in day to day public administration.¹³

In order to fight corruption effectively, it is crucial that China has a clear, systematic, and comprehensive COI management regime in place. Corruption itself is the abuse of public powers and resources for private gain,¹⁴ and conflict of interest situations induce such abuse. Managing COIs is critical to curbing corruption, as it is a forward-looking mechanism to reduce corruption at its early formation stage.¹⁵ “The United Nations Convention against Corruption (“UNCAC”) is the only legally binding universal anti-corruption instrument.”¹⁶ It re-

⁸ See DANIEL C.K. CHOW & ANNA M. HAN, *DOING BUSINESS IN CHINA PROBLEMS, CASES, AND MATERIALS* 14 (2012).

⁹ Chen Shanguang, *supra* note 6.

¹⁰ Perkins, *supra* note 7.

¹¹ *Id.*

¹² *Id.*

¹³ OECD, *OECD Guidelines for Managing Conflict of Interest in the Public Service*, POLICY BRIEF, Sept. 2005, at 2, <http://www.oecd.org/governance/pem/35365195.pdf> [hereinafter POLICY BRIEF] (acknowledging the complexity induced by the increasing interaction between the private and the public sectors: “[g]overnments have for many years been aware of the dangers of personal bias in public decision making. But in the past these concerns focused on traditional sources of influence, such as gifts or hospitality offered to public officials, and personal or family relationships. Increased co-operation with the private sector in recent years has made the whole issue more complex, multiplying the opportunities for conflicts of interest, such as: A public official having private business interests in the form of partnerships, shareholdings, board memberships, investments, government contracts, etc. A public official having affiliations with other organizations (e.g. a senior public official sits on the board of a non-profit organization that receives funding from the official’s agency). A public official leaving to work for a regulated private company or a chief executive taking up a key position in a government agency with a commercial relationship with his/her former company.”).

¹⁴ Michael Johnston, *The Political Consequences of Corruption: A Reassessment*, in *POLITICAL CORRUPTION: A HANDBOOK* 985, 986 (Arnold J. Heidenheimer, Michael Johnston & Victor T. LeVine eds., 1989).

¹⁵ Chen Shanguang, *supra* note 6.

¹⁶ UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/unodc/en/corruption/index.html> (last visited Jul. 27, 2013).

quires the State Parties to make a strong effort to adopt, maintain, and strengthen systems that promote transparency and prevent conflicts of interest.¹⁷ However, the UNCAC does not provide any specific requirements or guidance on the management of conflicts of interest.¹⁸ The Organization for Economic Co-operation and Development (“OECD”), on the other hand, has undertaken extensive work on the issue and has developed the Guidelines for Managing Conflict of Interest in the Public Service (“OECD Guidelines”)¹⁹ and the Managing Conflict of Interest in the Public Sector: A Toolkit (“OECD Toolkit”)²⁰ to provide the first comprehensive international benchmark helping governments review and modernize their COI policies for the public sector.

This article relies on the UNCAC, the OECD Guidelines, and the OECD Toolkit to provide important benchmarks for assessing the current COIs management framework in China. It also compares China’s legal framework of managing COIs with that of the U.S. The comparative studies not only provide readers with more concrete examples of the legislation and implementation of COI laws in these two very different jurisdictions, but also help identify the weaknesses in China’s legal framework. The study proceeds as follows: Section II discusses the definition and identification of COIs. Section III addresses the key measures for managing COIs and discusses the recommendations provided by the OECD. Section IV briefly concludes the study.

II. DEFINITION AND IDENTIFICATION OF CONFLICTS OF INTEREST

A. *How to Define and Identify COIs*

Understanding what constitutes COIs and identifying them accurately will be the prerequisite for the public sector to manage COIs. While there is no universal definition of COIs, several international and multilateral organizations have developed guidelines and established protocols to assist in standardizing definitions.²¹ The first anti-

¹⁷ See United Nations Convention Against Corruption, G.A. Res. 58/4, art. 7(4), U.N. Doc. A/RES/58/4 (Oct. 31, 2003) (prescribing that “[e]ach State Party shall, in accordance with the fundamental principles of its domestic law, endeavor to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest”).

¹⁸ *Id.*

¹⁹ OECD, MANAGING CONFLICT OF INTEREST IN THE PUBLIC SERVICE: OECD GUIDELINES AND COUNTRY EXPERIENCES (2003), available at <http://www.oecd.org/gov/ethics/48994419.pdf> [hereinafter *OECD Guidelines*].

²⁰ *OECD Toolkit*, *supra* note 1.

²¹ ABD/OECD ANTI-CORRUPTION INITIATIVE FOR ASIA AND THE PACIFIC, ASIAN DEVELOPMENT BANK & ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOP-

corruption instrument addressing COIs was the International Code of Conduct for Public Officials (the “Code”) contained in the annex to the General Assembly Resolution 51/59 of 12 December 1996.²² The Code makes extensive references to COIs,²³ outlining the most crucial parameters of the concept²⁴ and measures to address issues including the disclosure of assets, the prohibition of accepting gifts or other favors, confidential information, and political activity outside the official’s scope of work.²⁵ The OECD Guidelines provide a definition of COIs in a fairly straightforward and practical fashion: “a conflict between the public duties and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.”²⁶ In addition to the Guidelines, the OECD also issued the OECD Toolkit to provide a set of practical solutions (including tests for identifying COIs) for developing and implementing ways to manage conflicts of interest in accordance with the OECD Guidelines.²⁷

For the purpose of facilitating the discussion of how to identify COIs, this article introduces two hypothetical scenarios. In Scenario One, public official Alpha has the power to influence a tender process for a state contract to build a new stadium. A construction company where Alpha’s cousin serves as a CEO has presented a bid. In Scenario Two, public official Beta has possession of confidential information that belongs to her department. She is approached with an offer of \$10,000 in exchange for that confidential information. Do COIs arise in these two hypothetical scenarios?

MENT, *MANAGING CONFLICT OF INTEREST*, at xiii (2008), available at <http://www.oecd.org/site/adboecdanti-corruptioninitiative/40838870.pdf> [hereinafter *MANAGING CONFLICT OF INTEREST*].

²² See G.A. Res. 51/59, *supra* note 2, at 3.

²³ Although the references are made without actually defining what constitute COIs. *Id.*

²⁴ Dimitri Vlassis, *The United Nations Convention Against Corruption: A Fundamental Tool to Prevent Conflict of Interest*, in *MANAGING CONFLICT OF INTEREST*, *supra* note 21, at 5, 7 (2008).

²⁵ See G.A. Res. 51/59, *supra* note 2, at 4.

²⁶ POLICY BRIEF, *supra* note 13, at 2 (providing an example where a public official was deciding whether mobile phone charges were too high to illustrate how to define COIs: “Conflict of interest arises when public officials have to make decisions at work that may affect their private interests. For example, a public official with the telecommunications regulator has to decide whether mobile phone charges are too high – is he being influenced by the thought that one day he might want a job with a particular company? The key question is whether a public official is in a situation where his private interests might improperly influence the way he does his job.”).

²⁷ *OECD Toolkit*, *supra* note 1, at 3.

Under Scenario One, public official Alpha has the power to influence a tender process in which her cousin's company participated. The performance of her civic duties related to the tender (*e.g.*, the duties to keep other bidder's information confidential, to evaluate the bids fairly, etc.) could affect the cousin's company's chances of being selected as a contractor. If knowledge of her cousin's participation in the tender process has improperly influenced her performance of duties (*e.g.*, she did not conduct the bid evaluation in a fair, impartial, and independent manner but gave unjustified preference to her cousin's company), then a COI arises in Scenario One. Even if Alpha was not influenced by her cousin's participation and performed her duties as diligently and impartially as she should have, the mere fact that her cousin participated in the tender, once known to the other bidders or the general public, could generate distrust of the process and shake the confidence of the public toward the Alpha's integrity and that of her agency. This is usually defined as an apparent COI and the differences between an apparent COI and an actual COI (and a potential COI) will be discussed in further detail below.²⁸

In Scenario Two, public official Beta has possession of confidential information and is offered a bribe to give away the information. A COI exists because the official's performance of her civic duties—maintaining the confidentiality of information—could affect whether she would obtain the private gain (bribery) or not.²⁹ If the official accepted the bribe and disclosed the confidential information, this is no longer a question of COI but already a corruption³⁰—the abuse of the official's public role induced by the prospect of the private gain of \$10,000.

Private interest is not limited to financial or pecuniary interests, or those interests that generate a direct personal benefit to the public official.³¹ It can be either a financial interest (*e.g.*, bribery, compensation for a future position, kickback, scholarship, etc.) or a non-financial one (*e.g.*, benefiting a family member).³² The private interest also does not have to be illegitimate.³³ A COI may involve otherwise "legitimate private-capacity activity, personal affiliations and associations, and family interests, if those interests could reasonably be considered likely to influence improperly the official's performance of their duties."³⁴ A COI situation can be current (*e.g.*, being approached with an offer of bribe, or holding shares of a company); it may be found

²⁸ See *infra* text accompanying notes 38-43

²⁹ This is actual COI. See discussion *infra* Part II.B.

³⁰ *OECD Guidelines*, *supra* note 19, at 25.

³¹ *OECD Toolkit*, *supra* note 1, at 98.

³² See *id.*

³³ *Id.*

³⁴ *Id.*

to have existed for some time (*e.g.*, shareholding); or it can even be a future possibility (*e.g.*, the official may leave her current position and work for a regulated corporation some day in the future).³⁵ “The mere existence of the other interest, on its own, may not necessarily cause a conflict.”³⁶ Therefore, one must always focus on what the private interest has to do with the particular matter that is being considered by the public entity.³⁷

B. Actual, Apparent, and Potential COIs

A COI can be actual, apparent, or potential.³⁸ In an actual COI, a private interest could be affected by the performance of the official’s duties or functional responsibilities and is:

1. *Qualitatively*, of such a kind that it would be reasonable to believe that the private interest could improperly influence the official’s performance of her duties.³⁹ Take Scenario One for example. It is reasonable to believe that official Alpha has a sense of responsibility toward her cousin (or what if it was her son instead of a cousin?). Qualitatively, then, it would be reasonable to believe that her cousin’s involvement in the tender process could improperly influence her duty performance. This situation often arises with family or parental responsibilities, religious belief, professional or political affiliation, personal assets or investments, debts, etc.⁴⁰

2. *Quantitatively*, of such value that it would be reasonable to believe that the private interest could improperly influence the official’s performance of her duties.⁴¹ Consider Scenario Two as an example. Beta’s surrendering of the confidential information would bring her a large amount of personal gain (\$10,000 is almost two times the average annual income for Chinese citizens as of 2012⁴²). Other such examples include significant family business interest, opportunity to make a large financial profit, or the avoidance of a large financial loss, etc.⁴³

³⁵ *Id.*

³⁶ Edrick Child, Senior Solicitor, Office of the Controller and Auditor-Gen., Presentation to the LexisNexis Public Sector In-house Counsel Forum: Managing Conflicts of Interest in the Public Sector 5 (Nov. 17, 2005), available at <http://www.oag.govt.nz/reports/docs/conflicts-public-sector.pdf>.

³⁷ *Id.*

³⁸ *OECD Guidelines*, *supra* note 19, at 24.

³⁹ *Id.*

⁴⁰ *Id.* at 25.

⁴¹ *Id.* at 24.

⁴² *China Overview*, THE WORLD BANK, <http://www.worldbank.org/en/country/china/overview> (last visited Jul. 27, 2013).

⁴³ *OECD Guidelines*, *supra* note 19, at 25.

An apparent COI exists where it appears that a public official's private interests could improperly influence the performance of their duties, but it is not in fact the case.⁴⁴ An example given in the OECD Guidelines is when a senior official owns shares in a corporation (which appears to be a COI situation) but, unknown to the public at large, the official makes formal internal administrative arrangements to stand aside from all decision-making in relation to the contract for which the corporation is competing.⁴⁵

An apparent COI situation can be as seriously damaging to the public's confidence in a public official or the official's agency as an actual COI.⁴⁶ An apparent COI should be treated as an actual one until doubts are removed and the matter is determined.⁴⁷ The suggested measure in response to an apparent COI is to conduct careful investigation of the official's private interest and responsibilities to determine whether an actual corruption or COI exists.⁴⁸ In the U.S., the common law has recognized such situations where there is an appearance of impropriety in the conduct of government affairs and that such situations may require government officials to disqualify themselves from participating in decisions.⁴⁹ In hypothetical Scenario One, the public sector needs to temporarily remove official Alpha from the tender process or temporarily suspend her authority related to the state contract in order to clear doubts. In addition, the public sector should carry out an investigation to further determine whether corruption has already occurred and should discipline the corrupt official accordingly.

A potential COI arises where a public official has private interests which are such that a COI would arise if the official were to become involved in relevant official responsibilities in the future.⁵⁰ Within a COI situation, the official does not have private interests of a relevant kind at the *present moment*, but it is reasonably foreseeable that in the future the official's personal interests could become relevant.⁵¹ An example given in the OECD Toolkit is where the official works with a close relative in the same ministry but the two have no contact.⁵² It is reasonably foreseeable that a future contact may be es-

⁴⁴ *Id.* at 24.

⁴⁵ *See OECD Toolkit, supra* note 1, at 58.

⁴⁶ *See id.* at 24.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See* STATE OF CALIFORNIA DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, CONFLICTS OF INTEREST 3 (2010) (showing where an official must excuse himself from transactional deliberation if there exists a conflict of interest).

⁵⁰ *OECD Guidelines, supra* note 19, at 24.

⁵¹ *See OECD Toolkit, supra* note 1, at 25.

⁵² *See id.*

tablished where one of them is given the responsibility to audit the work of another.⁵³

III. MANAGING CONFLICTS OF INTEREST

Managing COIs is a complex and challenging task.⁵⁴ Legislation and regulations are needed not only to define and identify COIs, but also to standardize expectations towards official conduct and formalize approaches to prevention and enforcement.⁵⁵ In addition to legislation and regulations, supporting mechanisms are also needed to train, supervise, inspect, and enforce.⁵⁶ China's legal and regulatory framework broadly comprises three key components: (a) articles and provisions within laws, (b) specific regulations and rules, and (c) general principles and requirements.⁵⁷

In 2009, anti-corruption issues entered the spotlight. The Communiqué of the Fourth Plenum of the 17th Central Committee of the Communist Party proposed to establish a comprehensive COI prevention system.⁵⁸ In 2011, the Central Party Committee of Discipline designated seven provinces/cities as experimental points for implementing the COI prevention system.⁵⁹ Today's China has strict legislation and regulations for COI (in administrative, criminal, and, for most officials, the Communist Party's rules), and has established a management system with inspection, supervision, and education functions.⁶⁰ However, compared to the U.S., the current COI management framework in China is largely ineffective due to the insufficient enforcement of laws.⁶¹ The odds of a corrupt official ending up in prison

⁵³ *See id.*

⁵⁴ Song Dajun, *Codes of Conduct and Mechanisms to Prevent Conflicts of Interest in the People's Republic of China*, in *MANAGING CONFLICT OF INTEREST*, *supra* note 21, at 140, 147 (2008).

⁵⁵ *Id.*

⁵⁶ *MANAGING CONFLICT OF INTEREST*, *supra* note 21, at xvi.

⁵⁷ Song Dajun, *supra* note 54, at 141.

⁵⁸ Shiqijie Sizhongquanhui Baogao Quanwen (中共十七届四中全会公报) [Fourth Plenary Session of the 17th Congress of the Communist Party of China] (Sept. 15-18, 2009).

⁵⁹ Chen Shanguang, *supra* note 6; *see also* UNODC, *CHINA'S EFFORTS TO PREVENT CONFLICTS OF INTEREST* (2012) ("At present, extensive researches are being carried out in the country on conflicts of interest legislation and pilot projects are launched in 7 provinces and municipalities.").

⁶⁰ *MANAGING CONFLICT OF INTEREST*, *supra* note 21, at xvi.

⁶¹ Minxin Pei & Daniel Kaufmann, *Corruption in China: How Bad is It?* (Nov. 20, 2007), <http://carnegieendowment.org/2007/11/20/corruption-in-china-how-bad-is-it/340> (last visited July 28, 2013) ("Such measures are largely ineffective . . . further because the Central Commission for Discipline Inspection largely operates in

are less than three percent, making corruption a high-return, low-risk activity.⁶²

In addition, the lack of a centralized set of rules to serve as a convenient reference for self-policing and public monitoring makes effective enforcement less possible. The quantity of rules is inconsistent with the quality of the rules, and they are scattered in articles and provisions within various ethics laws, regulations and rules, departmental rules and requirements, local level rules and guidelines, Communist Party principles, and requirements in the forms of party rules.⁶³

A. China's Legal Framework for Managing COIs

1. Articles and provisions within laws

This category of legislation mainly refers to the provisions within China's Administrative Law, Criminal Law, and Civil Servant Law, outlining disciplinary punishment, employment restrictions, avoidance of COIs, etc. The main legislation tackling COI is the Civil Servant Law (which will be discussed in detail in this section).⁶⁴ Other laws such as the Judges Law (Article 7),⁶⁵ the People's Police Law (Article 45),⁶⁶ the Basic Code of Professional Conduct for Public Prosecutors (for Trial Implementation) (Articles 19 and 20),⁶⁷ the Audit Law

secrecy, it is unclear to researchers how allegedly corrupt officials are disciplined and punished.”)

⁶² Minxin Pei, *Corruption Threatens China's Future*, CARNEGIE ENDOWMENT FOR INT'L PEACE, Policy Brief No. 55 (2007).

⁶³ Chen Shanguang, *supra* note 6, at 3.

⁶⁴ Gongwuyuan Fa (公务员法) [Civil Servant Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2005, effective Jan. 1, 2006), art. 70, available at [http://www.lawinfochina.com/display.aspx?lib=law&id=4123&CGid=\(China\)](http://www.lawinfochina.com/display.aspx?lib=law&id=4123&CGid=(China)).

⁶⁵ Faguan Fa (中华人民共和国法官法) [Judges Law (2001 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 2001, effective July 1, 1995), art. 7 available at [http://www.lawinfochina.com/display.aspx?id=1861&lib=law&SearchKeyword=Judges%20Law&SearchCKeyword=\(China\)](http://www.lawinfochina.com/display.aspx?id=1861&lib=law&SearchKeyword=Judges%20Law&SearchCKeyword=(China)).

⁶⁶ Renmin Jingcha Fa (中华人民共和国人民警察法) [People's Police Law] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 26, 2012, effective Feb. 28, 1995), art. 45, available at [http://www.lawinfochina.com/display.aspx?id=13221&lib=law&SearchKeyword=People's%20Police%20Law%20of%20the%20People's%20Republic%20of%20China&SearchCKeyword=\(China\)](http://www.lawinfochina.com/display.aspx?id=13221&lib=law&SearchKeyword=People's%20Police%20Law%20of%20the%20People's%20Republic%20of%20China&SearchCKeyword=(China)).

⁶⁷ Jianchaguan Zhiye Daode Jiben Zhunze (Shixing) (最高人民法院关于印发《中华人民共和国检察官职业道德基本准则(试行)》的通知) [Basic Rules on the Prof'l Ethics of Pub. Prosecutors (for Trial Implementation)] (promulgated by the Sup. People's Procuratorate, Sept. 3, 2009, effective Sept. 3, 2009), art. 19-20, available at [http://www.lawinfochina.com/display.aspx?id=7763&lib=law&SearchKeyword=public&SearchCKeyword=\(China\)](http://www.lawinfochina.com/display.aspx?id=7763&lib=law&SearchKeyword=public&SearchCKeyword=(China)).

(Article 13),⁶⁸ and the Administrative Supervision Law (Article 14)⁶⁹ primarily address avoidance of COIs during each specific occupation (such as judges, police, prosecutors, auditors, and administrative supervisors).

2. *Specific regulations and rules*

China has implemented various regulations dealing with specific COI issues and how to manage them. These often pertain to accepting and offering gifts or hospitality, parameters for domestic and foreign official business, family activities and interests, and employment restrictions.⁷⁰

For example, in 2004, the Communist Party imposed strict regulations on public officials assuming post-employment positions in business and enterprise.⁷¹ The Central Committee for Discipline Inspection and the Central Organization Department issued a joint circular, instructing Party committees, governments, and related departments at all levels not to give approval for Party and government officials to take up concurrent posts in enterprises.⁷²

In addition, China established a COI avoidance system within its national civil service system.⁷³ The avoidance system is divided into three categories based on the nature of the conflict, the concerned parties, and the scope of the COI. These categories are: (1) public duty avoidance,⁷⁴ (2) region avoidance,⁷⁵ and (3) appointment avoidance.⁷⁶

⁶⁸ Shenji Fa (中华人民共和国审计法) [Audit Law (2006 Revision)] (promulgated by Standing Comm. Nat'l People's Cong., Feb. 28, 2006, effective Jan. 1, 1995), art. 13, available at <http://www.lawinfochina.com/display.aspx?id=4980&lib=law&SearchKeyword=&SearchCKeyword=%C9%F3%BC%C6%B7%A8> (China).

⁶⁹ Xingzheng Jiancha Fa (中华人民共和国行政监察法(2010修正)) [Administrative Supervision Law (2010 Revision)] (promulgated by Standing Comm. Nat'l People's Cong., June 25, 2010, effective May 9, 1997), art. 14, available at <http://www.lawinfochina.com/display.aspx?id=8818&lib=law&SearchKeyword=Administrative%20Supervision&SearchCKeyword=> (China).

⁷⁰ Song Dajun, *supra* note 54, at 141.

⁷¹ YONG GUO, NAT'L INTEGRITY SYSTEM COUNTRY STUDY REP.: CHINA 2006 13 (Transparency International 2006).

⁷² *Id.*

⁷³ UNODC, *supra* note 59, at 1.

⁷⁴ Hsiao-his Huang, *A Study of Avoidance Systems in Mainland China Civil Servants* (2010). The regulations clearly define the scope of the COIs for avoidance during appointment and also explicitly prohibit interference or disruption of the lawful implementation of administrative authority by civil servants who are related by kinship or hometown affiliation to the appointees. However, a lack of application procedures and administrative restrictions have been noted.

⁷⁵ *Id.* Region avoidance prevents localized officials from growing their regional ties and becoming corrupt. Due to the constant mobility of government officials and their lack of understanding of the local customs and public sentiments, they

A common weakness within the COI avoidance system is that no specific penalty provisions have been defined for government officials who violate the avoidance of conflict of interest regulations.⁷⁷

Although these regulations and rules lay out the detailed measures to manage COIs and thus complement the laws (which are more general), they are sporadic instead of systematic and are often impractical in terms of implementation. In addition, China's social norms emphasize a harmonious relationship between people and it is not surprising to see supervisors "being nice" to colleagues and intentionally choosing to overlook COIs or failing to manage COIs in a timely, strict, or thorough manner. As a result, there has been a lack of effective implementation.

3. *General principles and requirements*

This category includes codes of conduct, party rules on integrity, and guidelines regarding limits on economic and social activities.⁷⁸ These rules are not legally binding. However, Party rules can be powerful tools against corruption. At the end of 2012, the number of members of the Chinese Communist Party exceeded 85 million.⁷⁹ The Communist Party plays an important role in preventing corruption and managing COIs through its Central Commission for Discipline Inspection of the Communist Party of China.⁸⁰

B. Enforcing COI Laws and the Key Measures for Preventing COIs

In China, the People's Congress oversees the enforcement of COIs, which is administered through a centralized legal framework involving the police and the judiciary.⁸¹ Whereas in the U.S., the Department of Justice enforces COI and civil ethics laws at the federal

encountered difficulties during work implementation, resulting in an increase in the number of civil servants commuting back and forth between localities

⁷⁶ *Id.* Appointment avoidance concerns avoidance of conflicts of interest in local government agencies.

⁷⁷ *Id.*

⁷⁸ Song Dajun, *supra* note 54, at 141.

⁷⁹ *China Focus: China's Communist Party Membership Exceeds 85 Million*, ENGLISH.NEWS.CN, June 30, 2013, http://news.xinhuanet.com/english/china/2013-06/30/c_132498982.htm.

⁸⁰ *Cf.* UNODC, *supra* note 59, at 2. For example, Guidelines of Integrity issued on February 23, 2010 to fight widespread corruption within the Communist Party of China lists 52 "unacceptable practices" that says party officials who violate the guidelines will be severely punished and could face criminal charges.

⁸¹ MANAGING CONFLICT OF INTEREST, *supra* note 21, at xvii.

level.⁸² The National Bureau of Corruption Prevention (the “Bureau”) is a Chinese anti-corruption agency under the control of the State Council.⁸³ The Bureau was established in 2007 to improve transparency, combat corruption, and coordinate anti-corruption efforts within the government.⁸⁴ Through its website, the Bureau posts corruption-related news and allows citizens to submit complaints about corruption and the government.⁸⁵ Within hours of its launch, the number of complaints submitted crashed the website.⁸⁶ The Bureau is independent of the Central Discipline Inspection Commission, which investigates corruption and malfeasance within party ranks.⁸⁷

In the U.S., there is a series of COI statutes at the criminal, civil, and administrative levels.⁸⁸ COIs are an issue mainly addressed by the various ethics committees at federal, state,⁸⁹ and local levels.⁹⁰ At the federal level, the Office of Government Ethics (“OGE”) deals with prevention of COIs to a large extent.⁹¹

1. *Education and counseling*

Chinese officials are generally not as well aware of the importance of controlling COIs and do not receive the concept with full acceptance. There are voices within the government that oppose introducing a COI management system. Some argue that COIs are too new and advanced a concept for Chinese society to fully embrace. Some critics argue that it is not necessary to introduce a COI management system, as the Communist Party is a Party for the people and does not have any special personal interest. Therefore, a Party mem-

⁸² GRECO, SECOND ROUND EVALUATION REP. ON THE UNITED STATES OF AMERICA 1, 25 (Oct. 13, 2006), available at [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2\(2005\)10_USA_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2(2005)10_USA_EN.pdf).

⁸³ NATIONAL BUREAU OF CORRUPTION PREVENTION OF CHINA, <http://www.nbc.gov.cn/article/English/Organization/>.

⁸⁴ *National Corruption Prevention Bureau Established*, CHINA.ORG (Sept. 13, 2007) <http://www.china.org.cn/english/government/224301.htm>.

⁸⁵ *China's New Anti-Corruption Website Breakdown As Masses Log-On*, XINHUA NEWS AGENCY, http://news.xinhuanet.com/english/2007-12/19/content_7281144.htm.

⁸⁶ *Id.*

⁸⁷ See *National Corruption Prevention Bureau Established*, *supra* note 84; *How China is Ruled*, BBC (Oct. 8, 2012), <http://www.bbc.com/news/world-asia-pacific-13904439>.

⁸⁸ GRECO, *supra* note 82, at 23.

⁸⁹ See N.J. STAT. ANN. §§ 52:13D-12 - 52:13D-28, 5:12-117.1 (West 2006); MICH. COMP. LAWS §§ 15.301 - 15.310; 2009 Mass. Acts ch. 28, § 12; VA. CODE ANN. § 2.2-3100 (West 2008).

⁹⁰ *Cf.* GRECO, *supra* note 82, at 23.

⁹¹ *Id.*

ber will not face any COIs. Moreover, China already has comprehensive sets of integrity and self-discipline rules, so there is no need to establish a similar, paralleled system. Others argue that it is too early to introduce a COI management system because China is still at an early stage of socialism and is not mature enough to implement such a system. Some officials argue that COI prevention is an invention of the western society and does not suit China, whose culture is completely different. Additionally, there are those who argue that the attempt to introduce a COI management system will face too many obstacles as too many public officials have stakes involved and will prevent implementation of such mechanisms.⁹²

Despite the opposition, there have been attempts at establishing a “moral education” in China.⁹³ While education is extremely important to clear up the misunderstandings just mentioned, the educational programs in China nowadays still tend to be a mere formality, catering to the call from the central government.⁹⁴ There is no standardized systematic training program for new public officials and it is uncertain as to the content, format, and regularity with which agencies and departments train their new and old officials. Moreover, the current educational programs generally emphasize anti-corruption without incorporating a distinct component of COI prevention. Compared with China, the U.S. has a much more standardized and systematic set of educational requirement for public officials on COI prevention.⁹⁵

In the U.S., all federal executive branch employees are required by regulation to receive an initial ethics orientation within 90 days of entering the federal government.⁹⁶ High and mid-level executive branch employees are, in addition, required to receive subsequent annual ethics training.⁹⁷ State officials are also required to receive training (though individual states can have different training programs with differing duration, form, and regularity).⁹⁸ Comprehensive guides are available at both federal and state levels to help public officials evaluate COI situations and take appropriate action.⁹⁹

⁹² Chen Shanguang, *supra* note 6.

⁹³ Sir Tim Lankester, *Conflict of Interest: A Historical and Comparative Perspective*, in *MANAGING CONFLICT OF INTEREST*, *supra* note 21, at 28.

⁹⁴ *See id.*

⁹⁵ *See* 5 C.F.R. §§ 2638.703 – 705 (2013).

⁹⁶ 5 C.F.R. § 2638.703 (2013).

⁹⁷ 5 C.F.R. § 2638.704 (2013); 5 C.F.R. § 2638.705 (2013).

⁹⁸ *See id.*

⁹⁹ *See* U.S. OFFICE OF GOV'T ETHICS, EMP. STANDARDS OF CONDUCT (OCT 14, 2013) available at <http://www.oge.gov/Laws-and-Regulations/Employee-Standards-of-Conduct/Employee-Standards-of-Conduct>.

Take the State of California as an example: its Attorney General's Office issued a guide to "assist government officials in complying with California's conflict-of-interest laws and to assist the public and the news media in understanding these laws so that conflict-of-interest situations can be monitored and avoided."¹⁰⁰ The 126-page Guide contains 15 chapters, introducing the conflicts of interest and disqualification provisions under California's Political Reform Act of 1974, as well as the common law doctrine against COIs.¹⁰¹ The Guide also instructs the state officials and employees on how to deal with economic disclosure and campaign contributions and specifies the limitations on post-governmental employment, etc.¹⁰² The Guide also contains an issue spotter checklist and a step-by-step checklist to help public officials identify COI situations with detailed instructions:¹⁰³

- Step 1: Is a public official involved?
- Step 2: Is the official making, participating in the making of, or using his or her official position to influence the making of a governmental decision?
- Step 3: Does the public official have one of the qualifying types of economic interest?
- Step 4: Is the economic interest directly or indirectly involved in the governmental decision?
- Step 5: Will the governmental decision have a material financial effect on the public official's economic interests?
- Step 6: Is it reasonably foreseeable that the economic interest will be materially affected?
- Step 7: Is the effect of the governmental decision on the public official's economic interests distinguishable from its effect on the general public?
- Step 8: Despite a disqualifying conflict of interest, is the public official's participation legally required?

In China, public officials cannot find a similar guide to assist them in understanding and complying with COI laws and regulations. Nor do third parties have a benchmark against which to evaluate the behavior of a public official. China does not have government organs that provide ethics counseling, unlike the United States, where counseling is provided by designated oversight agencies or ethics officials. Without a consultant, COI training, or workshops, public officials do not have access to an open forum where COI issues can be discussed.

¹⁰⁰ CALIFORNIA DEP'T OF JUSTICE, *supra* note 49, at 3.

¹⁰¹ *See id.* at 6.

¹⁰² *See id.* at 35.

¹⁰³ *Id.* at 1-2.

Bearing in mind that China has harsh penalties on corruption,¹⁰⁴ public officials are more likely to keep emerging COIs to themselves even when they have identified such situations.

2. Declaration of assets

On May 28, 2013, *China Daily* published an article reporting that “China is considering improving the method used for asset declaration, as a research report has revealed that the deterrence power of the current system is not strong.”¹⁰⁵ This article is misleading in various ways. The expert¹⁰⁶ commented that “although the country issued a regulation on property declaration in 1995, the stipulations need to be improved.”¹⁰⁷

The earliest property declaration regulation in China is the Rule on the Reporting of Personal Information by Senior Public Officials issued in 2010.¹⁰⁸ This rule requires public officials to report 14 relevant pieces of private information, including personal income, properties and investments of the official and his/her spouse and children who live with the official, and the official’s and his/her children’s marital status.¹⁰⁹ However, the reported information is not “declared” (as claimed) or disclosed to the public, and such disclosure is not required under the Regulation of the People’s Republic of China on the Disclosure of Government Information.¹¹⁰

The U.S. disclosure system is one of strictly centralized, compliance-based ethics management, with the primary purpose of ensur-

¹⁰⁴ See e.g., *China Not to Drop Death Penalty for Corruption Crimes*, PEOPLE’S DAILY ONLINE, (Sept. 29, 2010, 7:53AM), <http://english.people.com.cn/90001/90776/90785/7153588.html>.

¹⁰⁵ Zhao Yanan, *Asset Declaration System to be Improved*, CHINA DAILY, http://www.chinadaily.com.cn/cndy/2013-05/28/content_16538330.htm (last updated May 5, 2013).

¹⁰⁶ *Id.* (identifying the expert as a professor at the Party School of the Central Committee of the Communist Party of China).

¹⁰⁷ *Id.*

¹⁰⁸ Guanyu Lingdao Ganbu Baogao Geren Youguan Shixiang De Guiding (关于领导干部报告个人有关事项的规定) [The Rule on the Reporting of Personal Information by Senior Public Officials] (promulgated by Gen. Office of the Communist Party of China & Gen. Office of the St. Council, May 26, 2010, effective May 26, 2010), art. 3-4, http://www.gov.cn/jrzq/2010-07/11/content_1651255.htm (China).

¹⁰⁹ *Id.*

¹¹⁰ Zhengfu Xinxi Gangkan Tiaoli (中华人民共和国政府信息公开条例) [Regulation on the Disclosure of Government Information] (promulgated by St. Council, Apr. 5, 2007, effective May 1, 2008) <http://www.lawinfochina.com/display.aspx?lib=law&id=6011&CGid> (China) (Art. 2 of the Regulation limits the scope of the disclosure to information obtained during the performance of public duties).

ing transparency and prevention of COIs.¹¹¹ The set-up of the system reinforces that purpose, as functions of declaration compliance and COI identification are separated from those of verification and crime detection.¹¹² In the U.S., individuals in the most senior positions at the federal level are required to file a personal financial disclosure report, and the general public has access to the disclosed information.¹¹³

At the State level, similar disclosure requirements apply. For example, in the Commonwealth of Virginia, the State and Local Government Conflict of Interests Act requires that Virginia governmental officers and employees disclose their financial interests pertaining to real estate, business interests, gifts, travel, liabilities, directorships, and other matters depending on the office or employment of the occupant.¹¹⁴ These disclosure statements are available for review by the public.¹¹⁵ According to the disclosure report, subsequent steps may need to be taken to address actual COIs or potential COIs, such as prosecution, administrative sanction, divestiture of an asset, or resignation from an outside position.¹¹⁶

3. *Avoidance*

Chapter XI of the Civil Servant Law in China deals with avoidance (and the exchange of personnel, including transfer of position, and temporarily assuming a leadership position in an inferior entity).¹¹⁷ Article 68 of the Civil Servant Law (in Chapter XI) prescribes that:

Where there is such relationship as husband and wife, lineal descent, collateral consanguinity within three generations or close affinity between civil servants, the per-

¹¹¹ OECD, *ASSET DECLARATIONS FOR PUBLIC OFFICIALS: A TOOL TO PREVENT CORRUPTION* 29 (2011), available at <http://www.oecd.org/daf/anti-bribery/47489446.pdf>.

¹¹² *Id.*

¹¹³ GRECO, *supra* note 82, at 24.

¹¹⁴ Commonwealth of Virginia, *Conflict of Interest*, <http://www.commonwealth.virginia.gov/stategovernment/Conflict/conflict.cfm> (last visited Jul. 28, 2013).

¹¹⁵ *Id.*

¹¹⁶ GRECO, *supra* note 82, at 24.

¹¹⁷ Civil Servant Law, *supra* note 64; also see UNODC, *supra* note 59 (Other laws and regulations dealing with COIs in China include the Judges Law of the People's Republic of China, the Audit Law of the People's Republic of China, the Law of the People's Republic of China on Administrative Supervision, the Securities Law of the People's Republic of China, and the Regulations on the Executives of State-owned Enterprises for Performing Management Duties with Integrity also prescribe the correct exercise of official power and voluntary avoidance of COIs by different professionals. However, this study does not cover the COI provisions in these regulations.)

sons concerned shall not assume posts immediately subordinate to the same leading member in the same organ or hold posts with an relation of immediate superior and subordinator, or take such work as organization, human resource, disciplinary investigation, supervision and inspection auditing and finance in the organ where one party concerned holds a leading post.

Where there is any need to avoid taking posts due to the peculiarities of region or work features, the avoidance shall be decided by the administrative department of public security above the provincial level.¹¹⁸

Article 68 aims to prevent and manage conflicts of interest originated from family ties. However, there are several problems with this provision. First, it does not provide a clear definition or scope of the term “same organ.” The ambiguity of this term leaves room for interpretation and affects the implementation of avoidance provisions. Second, it deals with such relationships existing in the same organ but does not clearly prohibit such relationships from existing cross-level or cross-department. Third, the second half of Article 68 provides an outlet for the restriction and makes it difficult to oversee whether this exception is being used in moderation or whether it is being abused.

In addition to family ties, the Civil Servant law also requires “regional avoidance.” Article 69 requires avoidance in situations “[w]here a civil servant assumes the leading post of an organ at the township level or county level or the relevant department thereof.”¹¹⁹ Article 69 addresses cross-department COIs but does not explicitly prohibit COI situations above the county level.

Article 70 of the Civil Servant Law seems to be a catch-all provision and requires avoidance in general COI situations, including “(1) [w]hen any of his *personal interests* is involved; (2) [w]hen any of the *interests of his relatives* as described in paragraph 1 of Article 68 of the present Law is involved; or (3) [a]ny *other circumstance* that may have any impact on the impartiality of duty performance.” (emphasis added).¹²⁰ This provision potentially covers a broad range of COI situations and is crucial in filling in the gaps of Articles 68 and 69. However, the term “interests” is not defined in the Law.

Article 71 sets out the procedure for implementing the avoidance provisions.¹²¹ According to Article 71, the procedure will only be triggered when there is a report of a COI occurring, either submitted

¹¹⁸ Civil Servant Law, *supra* note 64, art. 68.

¹¹⁹ *Id.* art. 69.

¹²⁰ *Id.*

¹²¹ *Id.*

by the official herself, or an interested party, or any other person.¹²² As mentioned previously, China's government agencies do not systematically contain an integrity office or ethics officer where consultation service can be provided, and the Civil Service Law does not provide a clear definition on key terms such as "same organ" or "interests." As COIs can be extremely complicated, it is often hard for a public official or the general public to identify situations that an official should avoid. As a result, the number of self-initiated reports of COIs or reports from other people (whether an interested party or the general public) is not in proportion with the frequency of situations where COIs actually exist.

4. *Restriction of activities*

The UNCAC spots some areas that are at risk for COIs. The UNCAC requires State parties to endeavor to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, at a minimum: (1) their outside activities, (2) employment, (3) investments, (4) assets, and (5) substantial gifts or benefits, from which a COI may result with respect to their functions as public officials.¹²³ In comparison, the OECD provides an open-ended checklist for identifying "at-risk" areas for COIs. These areas are: (1) additional ancillary employment, (2) inside information, (3) contracts, (4) official decision making, (5) policy advising, (6) gifts and other forms of benefit, (7) personal, family and community expectations and opportunities, (8) outside concurrent appointments, and (9) business or NGO activity after leaving public office.¹²⁴

The Chinese laws and regulations set detailed and specific limits to the exercise of power. It is generally required by the Constitution that "[t]he people administer state affairs and manage economic, cultural, and social affairs through various channels and in various ways in accordance with the law."¹²⁵ In addition, many provinces have issued measures to restrict administrative discretionary power.¹²⁶ Arti-

¹²² *Id.* art. 71. (China's Criminal Law also prohibits retaliation against informants or accusers. Art. 254 prescribes that "[w]orkers of state organs who abuse their authority by retaliating against or framing accusers, petitioners, critics, or informants, in the name of conducting official business, are to be sentenced to two years or less in prison or put under criminal detention. If the case is serious, they are to be sentenced to two to seven years in prison.").

¹²³ G.A. Res. 58/4, *supra* note 17, art. 8.

¹²⁴ See OECD *Toolkit*, *supra* note 1, at 28-31.

¹²⁵ XIANFA art. 2, § 1 (1982) (China).

¹²⁶ See Hunan Sheng Guifan Xingzheng Cailiang Quan Banfa [Measures for Regulating Administrative Discretion] (promulgated by the Standing Comm. Provincial People's Cong., Oct. 27, 2009, effective April 17, 2010) (Gazette of Hunan Province); see also Liaoning Sheng Guifan Xingzheng Cailiang Quan Banfa [Mea-

cle 397 of China's Criminal Law also criminalizes "[s]tate personnel who abuse their power or neglect their duties, causing great losses to public property and the state's and people's interests" and impose "not more than three years of fixed-term imprisonment or criminal detention; and when the circumstances are exceptionally serious, not less than three years and not more than seven years of fixed-term imprisonment."¹²⁷

5. *Other measures to prevent COIs*

In addition to legislation and regulations, there are many other key measures to prevent COIs, such as adequate compensation for public officials, splitting of decision-making, job rotation in critical posts,¹²⁸ fair appointment or promotion mechanism based on merits and integrity, efficient management and leadership, and oversight by the civil society organizations and independent press, transparency.¹²⁹ Unlike the U.S., where there is a stronger advocacy from the civil society and close oversight from independent press and the general public, China's COI management framework is part of a top-down style anti-corruption mechanism.¹³⁰ Although China has put in place a legal system to deal with COIs and has a strong push from the central government to fight corruption, it does not have adequate oversight from the civil society or media, nor does it have enough transparency to ensure public access to relevant information.¹³¹

C. *The OECD recommendations for managing COIs*

The OECD provides a unique policy instrument for decision-makers to review existing solutions and modernize mechanisms in line

asures for Regulating Administrative Discretion] (promulgated by the Standing Comm. Provincial People's Cong., Jan. 20, 2011, effective Feb. 20, 2011) (Gazette of Liaoning Province).

¹²⁷ Xing Fa (刑法) [Criminal Law] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997), (China) available at <http://www.lawinfochina.com/display.aspx?id=354&lib=law&SearchKeyword=criminal%20law&SearchCKeyword=>

¹²⁸ COUNCIL OF EUROPE, *supra* note 4 ("Experience shows that an adequately remunerated civil service is by and large more likely to be immune to corruption. Preventive measures such as: splitting of decision-making, requiring important decision to be taken by more than one person, job rotation in critical posts, regular declaration of assets by more senior officials and subsequent inspection of the information provided have proven effective.").

¹²⁹ See Lankester, *supra* note 93, at 15.

¹³⁰ See Ting Gong, *More Than Mere Words, Less Than Hard Law: A Rhetorical Analysis of China's Anti-Corruption Policy*, 27 PUB. ADMIN. Q., 159, 182 (2003).

¹³¹ See Dai Changzheng, *Corruption and Anti-Corruption in China: Challenges and Countermeasures*, 3 J. INT'L BUS. ETHICS 58, 65, 68 (2010).

with good practices in OECD countries.¹³² The proposed measures are intended to reinforce each other to provide a coherent and consistent approach to managing COI situations,¹³³ but can also be useful for the Chinese government to incorporate into its COI management mechanism. The key recommendations for managing COI include the following.

1. *Identify relevant conflicts of interest situations*

While most countries have developed legislation and preventive measures for post-public employment, the prohibitions are mostly general and rarely tailored toward specific risk areas.¹³⁴ Moreover, as previous discussion about China illustrates, implementation mechanisms often tend to be weak.¹³⁵ Measures for supporting, tracking, and ensuring the implementation of decisions on new employment are either lacking or inconsistent.¹³⁶ The OECD recommends that government provide a clear and realistic description of what circumstances and relationships can lead to a COI situation, and ensure that its COI policy is supported by organizational strategies and practices to help identify concrete COI situations.¹³⁷ The U.S. Office of Government Ethics has done impressive work in incorporating a range of examples of private interests into its Standards of Ethical Conduct for Employees of the Executive Branch (“Standards”).¹³⁸ China’s legislation and regulations have provided necessary definitions. However, there is a lack of concrete examples to help identify COIs and it is not clear to what extent public officials are trained on how to avoid COIs.¹³⁹

2. *Establish procedures for identifying, managing, and resolving COI situations*

The purpose of establishing such procedures is twofold. First, it is to help ensure that public officials know what is required of them so that they can efficiently identify COIs and promptly disclose relevant information; and second, to set clear rules on what is expected of them

¹³² *OECD Guidelines*, *supra* note 19, at 40.

¹³³ *OECD Toolbox*, *supra* note 1, at 100.

¹³⁴ *MANAGING CONFLICT OF INTEREST*, *supra* note 21, at xv.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *POLICY BRIEF*, *supra* note 13, at 6.

¹³⁸ Standards of Ethical Conduct for Employees of the Executive Branch, 76 Fed. Reg. 38, 547 (July 1, 2011) (to be codified at 5 C.F.R. pt. 2, 635).

¹³⁹ Ting Gong & Jianming Ren, *Hard Rules and Soft Constraints: Regulating Conflict of Interest in China*, 22 *J. CONTEMP. CHINA* 1, 2-3 (2013).

when dealing with COIs so that they can opt for positive resolution or management of a continuing or pervasive COI.¹⁴⁰

3. *Demonstrate leadership commitment*

Effective political leadership is also a key component of OECD's recommendations. Managers and leaders should take responsibility for the effective application of COI policy by:

- Establishing a consistent decision-making process;
- Taking decisions based on this model in individual cases;
- Monitoring and evaluating the effectiveness of the policy, and
- Where necessary, enhancing or modifying the policy to make it more effective.¹⁴¹

In addition to the targeted legislation on integrity, implemented regulations pertaining to ethics, and formulated official codes of conduct for public officials, the Chinese central government and Communist Party have demonstrated a strong commitment to preventing COIs in the public sector as part of their strong push for an anti-corruption campaign.¹⁴²

China is often able to implement top-down policies in a highly efficient (but not necessarily constant or real) manner.¹⁴³ As a result of the leadership's commitment to fighting corruption, recklessly extravagant spending of government officials has been significantly reduced (at least on its face). As the *New York Times* describes:

Life for the almighty Chinese government official has come to this: car pools, domestically made wristwatches and self-serve lunch buffets. In the four months since he was anointed China's paramount leader and tastemaker-in-chief, President Xi Jinping has imposed a form of austerity on the nation's famously free-spending civil servants, military brass and provincial party bosses . . . Gone, for now, are the freshly cut flowers and red-carpet ceremonies that used to greet visiting dignitaries. This month, military officers who arrived here for the annual National People's Congress were instructed to share hotel rooms and bring their own toiletries.¹⁴⁴

¹⁴⁰ POLICY BRIEF, *supra* note 13, at 6.

¹⁴¹ *Id.*

¹⁴² *Premier Vows Deepened Corruption Fight*, Xinhua News Agency (Mar. 26, 2013), http://news.xinhuanet.com/english/china/2013-03/26/c_132263818.htm.

¹⁴³ Ting Gong, *supra* note 139, at 163.

¹⁴⁴ Andrew Jacobs, *Elite in China Face Austerity Under Xi's Rule*, N.Y. TIMES (Mar. 27, 2013) http://www.nytimes.com/2013/03/28/world/asia/xi-jinping-imposes-austerity-measures-on-chinas-elite.html?pagewanted=all&_r=0. There has also

Debates never stop as to how real this anti-corruption campaign is and how far it can go.¹⁴⁵ But what is lacking from this moderation campaign is a reform in the rule of law to clean up the scattered regulations and rules about COIs, or a reform to institute integrity offices and ethics officials in different departments, or to impose mandatory educational programs with a fixed course design and clear goal—substantive administrative and legal steps to fulfill the commitment of President Xi. It is still too early to conclude whether Xi’s commitment to fight corruption is real or whether his austerity policies are consistent. However, based on the current campaign that has been going on for months, it is safe to say that the element of effective COI policy is missing.¹⁴⁶

4. *Create a partnership with employees*

According to the OECD, governments should ensure wide publication and understanding of COI policy through training, notifying, and updating public officials; review “at-risk” areas for potential COI situations; identify preventive measures that deal with emergent conflict situations; and develop an open organizational culture where dealing with COI matters can be freely raised and discussed.¹⁴⁷

Such open organizational culture is largely missing in China’s public sector. As mentioned earlier, without an agency consultant, COI management training, or workshop, public officials do not have access to an open forum where COI issues can be freely raised and discussed. A more common approach for the public officials to handle COIs is simply to keep the situation to themselves. Therefore, it is important to establish a supportive mechanism in China to include training and consulting to form a partnership with public sector employees.¹⁴⁸ Not only can it improve the public officials’ skills in identifying, resolving, and managing COIs, it also helps foster an open institutional culture.¹⁴⁹

been a tightening of control over military license plates in order to crack down on the abuse of military license plates by military officials as part of the recent anti-corruption campaign led by new president Xi Jinping. The new regulation took effect on 1st of May 2013, prohibiting the use of military license plates on luxury cars such Mercedes-Benzes and BMWs.

¹⁴⁵ Celia Hatton, *How Real is China’s Anti-Corruption Campaign?*, BBC News (Sep. 4, 2013), <http://www.bbc.co.uk/news/world-asia-china-23945616>

¹⁴⁶ Linda Yueh, *China’s Corruption Drive*, BBC News (Aug. 1, 2013), <http://www.bbc.co.uk/news/business-23541923>.

¹⁴⁷ POLICY BRIEF, *supra* note 13, at 6.

¹⁴⁸ See *OECD Toolkit*, *supra* note 1, at 107.

¹⁴⁹ See *id.*

5. Enforce the COI policy

When COIs are correctly identified, what to do next? The OECD recommends that governments develop monitoring mechanisms to detect breaches of policy and provide procedures for establishing COI offenses and consequences for non-compliance, including disciplinary sanctions.¹⁵⁰ The existing *guanxi* culture is often seen as a major obstacle in enforcing COIs (and other anti-corruption) policies.¹⁵¹ But the anti-corruption history of Hong Kong where the society is also established on a similar culture demonstrates that an effective enforcement system can overcome the cultural obstacle.¹⁵²

Internal control and external oversight institutions need to work together to effectively detect COI offenses and be included in a coherent institutional framework in COI prevention and policy enforcement.¹⁵³ It is also important to establish complaint mechanisms to channel allegations of non-compliance and initiate investigations in response.¹⁵⁴ Only with procedures established is it possible to activate them and sanction public officials for non-compliance with the COI policy.¹⁵⁵

6. Initiate a new partnership with the business and non-profit sectors

In addition to overseeing public administration, the private sector, non-profit organizations, and media can also engage in the administration itself (especially the private sector).¹⁵⁶ During their engagements, it is important for the government to educate them about COIs and how to prevent improper gain in COI situations. The OECD recommends the government take measures to maximize the benefit of involving representatives from other sectors in the work of public bodies.¹⁵⁷ This includes engaging the business and non-profit sectors in elaborating and implementing the COI policy, anticipating potential

¹⁵⁰ POLICY BRIEF, *supra* note 13, at 6.

¹⁵¹ Yufan Hao & Michael Johnston, *Corruption and the Future of Economic Reform in China*, in POLITICAL CORRUPTION: A HANDBOOK 583, 594 (Arnold J. Heidenheimer et al. eds., Transaction Publisher 2009) (the authors correctly pointed out that "Chinese traditions may also add to the current corruption. Chinese society has traditionally been based not on legalisms, but on Confucian ideals and face-to-face relationships of loyalty, favor, and friendship. It was in these personal exchanges that the individual sought and found security, not in any legal code.").

¹⁵² Judy T. Gulane, *Independence Empowers Hong Kong's Anti-Corruption Watchdog*, BUSINESSWORLD, Feb. 19, 2008, at S1.

¹⁵³ See OECD Toolkit, *supra* note 1, at 108.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ POLICY BRIEF, *supra* note 13, at 6.

¹⁵⁷ *Id.*

COIs through boards or advisory bodies, and establishing mechanisms to educate and prevent improper advantages gained by persons or institutions.¹⁵⁸

The experience of the U.S. in tackling COIs highlights the complexity of the issue and suggests that informal monitoring by watchdog groups may be just as important as official monitoring in ensuring adequate enforcement.¹⁵⁹ Compared with the U.S., China's domestic civil society is not as advanced. China does not have genuine NGOs, but has established a system where all NGOs are government-organized or government institution affiliated in order to impose tight control over these organizations.¹⁶⁰ Even though the force of NGOs has grown in recent years, a disproportionate amount of Chinese NGOs focus on environmental issues instead of governance issues such as corruption.¹⁶¹ The Chinese media does not enjoy the same extent of freedom and independence.¹⁶² They have been discouraged from exposing corruption until very recently.¹⁶³

IV. CONCLUSION

Conflicts of interest cannot always be avoided or prohibited. However, they need to be identified, disclosed, and effectively managed. Managing conflicts of interest properly brings a range of benefits for the public sector. First and foremost, opportunities for corruption or improper conduct are reduced. Second, effective policies and procedures for identifying, disclosing, and managing conflicts of interest mean that unfounded accusations of bias can be dealt with more easily and efficiently. Third, the public sector can demonstrate its commitment to good governance by addressing an issue that is commonly associated with corruption and misconduct.¹⁶⁴ Failure to identify, declare, and manage a conflict of interest leads to serious corruption and makes managing conflicts of interest an important corruption prevention strategy.¹⁶⁵

¹⁵⁸ *Id.*

¹⁵⁹ *MANAGING CONFLICT OF INTEREST*, *supra* note 21, at xvi.

¹⁶⁰ *CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT* 113 (Kristen Day ed., 2005).

¹⁶¹ *SCHOOLING FOR SUSTAINABLE DEVELOPMENT IN CHINESE COMMUNITIES: EXPERIENCE WITH YOUNGER CHILDREN* 117 (John Chi-Kin Lee & Michael Williams eds., 2009).

¹⁶² *See* JIANGHAO ZHOU, *CHINA'S PEACEFUL RISE IN A GLOBAL CONTEXT: A DOMESTIC ASPECT OF CHINA'S ROAD MAP TO DEMOCRATIZATION* 112 (2010).

¹⁶³ Lankester, *supra* note 93, at 28.

¹⁶⁴ INDEP. COMM'N AGAINST CORRUPTION, N.W.S. & CRIME & MISCONDUCT COMM'N, *QUEENSLAND, MANAGING CONFLICTS OF INTEREST IN THE PUBLIC SECTOR* 7 (2004).

¹⁶⁵ *Id.*

The mechanisms mentioned above for controlling conflicts of interest are likely to be more effective if the society's informal norms, codes of conduct, and conventions are supportive of the rules.¹⁶⁶ It is hard to evaluate the presence of such societal norms in China. On the one hand, the Chinese society has long been disgusted by rampant corruption and looks forward to a cleaner government and fairer distribution of wealth. On the other hand, as the economy develops rapidly, and material life is greatly enriched in China, and as faith in Marxism-Leninism has declined, nothing remains to take its place from the point of view of restraining the hot pursuit of self-interest (materialism certainly will not).¹⁶⁷ The tradition of *guanxi*, the respect for social relations and reciprocity, may also have set obstacles for effectively enforcing COI policy.¹⁶⁸ Under this tradition, the private sector and politicians may have a relationship where their closeness goes beyond the appropriate limit.

China has gradually evolved into a materialistic society. It might be difficult for an outsider to understand the popularity of civic positions where monthly salaries are often too modest to sustain a comfortable life. The competitiveness of civic position entrance tests is not a result of a popular pursuit of a public service career, but of a materialistic interest in the stability of civil servant positions and the lucrative grey income. Despite progress in enacting laws and strengthening the push from the central government, corruption remains endemic in China's public sector.

The problem is not some inherent, immutable feature of Chinese culture. We certainly cannot deny the influence of culture, but Hong Kong sets a perfect example of how a shared value of good governance can overcome the influence of culture, as it turned out to be one of the most successful territories in combating corruption based on the same cultural origin as the mainland.¹⁶⁹ Neither is the problem a simple lack of political will. China's central government has a strong motivation to fight corruption, as widespread corrupt practices among public officials will further ignite the already-pervasive public discontent and lead to greater social instability.¹⁷⁰ The crux of the problem,

¹⁶⁶ Lankester, *supra* note 93, at 17.

¹⁶⁷ *Id.* at 28

¹⁶⁸ *Id.* at 28; also see Hao & Johnston, *supra* note 151, at 294.

¹⁶⁹ TRANSPARENCY INTERNATIONAL, TRANSPARENCY INTERNATIONAL CORRUPTION PERCEPTIONS INDEX 5 (2012), available at [http://www.ey.com/Publication/vwLUAssets/2012_TI_CPI/\\$FILE/2012%20TI%20CPI.pdf](http://www.ey.com/Publication/vwLUAssets/2012_TI_CPI/$FILE/2012%20TI%20CPI.pdf) (Hong Kong ranks no. 14 with a CPI score of 77). TRANSPARENCY INTERNATIONAL, THE CORRUPTION PERCEPTIONS INDEX 2013, available at <http://cpi.transparency.org/cpi2013/results/> Hong Kong ranks no. 15 with a CPI score of 75.

¹⁷⁰ See generally VINAY KUMAR BHARGAV & EMIL P. BOLONGAITA JR., CHALLENGING CORRUPTION IN ASIA: CASE STUDIES AND A FRAMEWORK FOR ACTION, DIRECTIONS IN

one that President Xi will not be able to overcome during his term as the paramount leader of China, lies in the nature of the interests that have captured and ensconced themselves in the institutions of state power—interests that all senior level public officials have stakes in, and interests that President Xi has to carefully balance.¹⁷¹

President Xi is well aware of the public relations crisis that the government and the Party are facing. He has promised a thorough cleanup and has taken several steps to fight corruption and restore public confidence and trust since he took office.¹⁷² However, China still has a long way to go for transparency and in its fight against corruption.

DEVELOPMENT 228 (World Bank Publications, 2004) (analyzing the crux of the corruption problem in Indonesia and the analysis also suits the current stage of China: “[d]espite progress in enacting reforms to control corruption, corruption remains endemic in Indonesia. The problem is not some inherent, immutable feature of Indonesian culture, nor is it best described in terms of the simple lack of political will or of necessary institutions per se. The crux of the problem lies in the nature of the interests that have captured, appropriated, and ensconced themselves in the institutions of state power since the beginning of the New Order. From that standpoint, the lack of real inroads into eradicating corruption thus far is not entirely surprising.”).

¹⁷¹ See generally *id.*

¹⁷² See *Xi: Upcoming CPC Campaign a “Thorough Cleanup” of Undesirable Practices*, XINHUANET, http://news.xinhuanet.com/english/china/2013-06/18/c_132465115.htm (last visited Jul. 28, 2013); see also *Xi Jinping Vows to Fight ‘Tigers’ and ‘Flies’ in Anti-Corruption Drive*, GUARDIAN, <http://www.guardian.co.uk/world/2013/jan/22/xi-jinping-tigers-flies-corruption> (last visited Jul. 28, 2013).